COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 15901-99**

Clark E. Dunn Employee
U.S. Art Company, Inc. Employer
Eastern Casualty Insurance Co. Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Carroll)

APPEARANCES
James J. Collins, Esq., for the employee
Frank L. McNamara, Jr., for the insurer at hearing
Kerry G. Nero, Esq., for the insurer on brief

MCCARTHY, J. This appeal presents the question of whether the insurer's due process rights were violated by an administrative judge's exclusion of the insurer's additional medical evidence for failure to provide the doctor's curriculum vitae, where the first notice that the medical report was excluded came in the filed decision. (Dec. 2.) Answering that question in the affirmative, we reverse the decision and recommit the case for a new hearing.[1]

The employee suffered a major depression and further psychiatric complications as a result of an injury to his neck and shoulders on August 24, 1998. The orthopedic injury was accepted by the insurer. (Dec. 2-3.) In his claim for permanent and total incapacity benefits, based on both his orthopedic and psychiatric conditions, the employee underwent an orthopedic impartial examination. At the hearing on January 8, 2002, the judge ruled that the report of that impartial physician was inadequate to address the employee's psychiatric condition. As a result, the judge allowed the parties to introduce their own expert psychiatric evidence. (Dec. 2; Tr. 3-4.) See § 11A(2). The

[1] The judge who presided at the hearing no longer serves with the department.

parties complied and provided the judge with their various reports addressing that issue. The insurer sent a report of Alfred G. Jonas, M.D., with a cover letter dated April 17, 2002, which the judge received on April 18, 2002. (Insurer's Ex. # 2.) The employee provided the reports of his treating psychiatrist, Daniel Shaw, M.D., with a cover letter dated May 15, 2002. (Employee's Ex. # 3.) Thereafter, apparently at a "medical motion conference" held on May 16, 2002, (Tr. 4, 48), the judge marked these documents as admitted into evidence.[2]

When the judge issued her decision, however, she wrote:

> Both parties submitted medical reports, however the insurer's report was not accompanied by the physician's curriculum vitae and the employee objected to its admission. Notwithstanding the employee's objection, the insurer did not offer the physician's curriculum vitae late. 452 C.M.R. 1.11(6)[3] requires a curriculum vitae for admission of medical reports prepared by physicians engaged by the offering party. Accordingly, the employee's objection to the admission of the insurer's additional medical evidence is sustained.

(Dec. 2.)

The insurer on appeal asserts that the judge violated its due process right to have its medical evidence introduced and considered, where the employee's objection to the lack of a curriculum vitae is not in the record, and the judge did not notify the insurer of her exclusion of Dr. Jonas's report prior to filing the decision. See O'Brien's Case, 424

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[2] The judge coined the phrase, "medical motion conference" to describe the proceeding which took place that day. The apparent purpose of this proceeding was to accept medical reports into evidence as part of the hearing record. A stenographic record of the events of that day may have assisted in resolving the issue at hand.

[3] 452 Code Mass. Regs. § 1.11(6) reads in pertinent part as follows:

> At a hearing . . . in which the administrative judge has made a finding under M.G. L. c. 152, § 11A(2) that additional testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner, a party may offer as evidence medical reports prepared by physicians engaged by said party, together with a statement of said physician's qualifications. . . .]

Mass. 16, 23 (1996)(failure of due process results from foreclosing "opportunity to present testimony necessary to present fairly the medical issues"). See, generally, Haley's Case, 356 Mass. 678, 682 (1970). The insurer is correct.

On May 16, 2002 (apparently the day of a proceeding on the medical issues in the case), the judge "marked and admitted into evidence" the insurer's additional medical evidence, the medical report of its expert psychiatrist, Dr. Jonas. (Insurer's Ex. # 2.) This report was filed in response to the judge's ruling that the impartial orthopedic report was inadequate to address the psychiatric component of the employee's claim. (Dec. 2.) Although the board file also contains a *different* packet of documents marked as Insurer's Ex. # 2, namely *all* of the insurer's exhibits that had been forwarded to the impartial orthopedic physician, we conclude that this "Insurer's Ex. # 2" was marked in error.[3] This is because three of the five documents within that packet have nothing to do with the employee's psychiatric claim, which, again, was the only part of the case for which the judge allowed additional medical evidence.[4]

As there is no transcript of the additional medical evidence proceeding on May 16, 2002, there is no way for us to determine whether there is any basis for the employee's assertion that he raised the issue of the lack of Dr. Jonas's C.V., and objected to the submission of the doctor's report at that proceeding. The lack of a record of the employee's objection is fatal to his assertion of that action on appeal. See Hourihan v. David & Hourihan, Inc., 16 Mass. Workers' Comp. Rep. 26, 29 (2002). The employee further asserts that the judge's handwritten notations, such as "Ins. # 2 Mk'd and admitted into evidence" on the cover letter to Dr. Jonas's report, are "definitely not part of the record." (Employee's Brief, 8.) We disagree. The judge's handwritten marking of exhibits – while contradictory and confusing in this case – is indeed part of the record.

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[3] Rizzo v. M.B.T.A, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002) (reviewing board may take judicial notice of documents in the board file).

[4] At the very least, this confusion would necessitate a recommittal for clarification, which would yield the same result as our disposition of reversal and recommittal, since the judge is no longer sitting, and a new hearing will be required, in any event.

We take judicial notice of the fact that most, if not all, administrative judges at the department mark exhibits by using handwritten notations.

Because we conclude that the insurer's due process rights were violated by the failure of the judge to notify the insurer of her exclusion of its additional medical evidence, we reverse the decision and transfer the case to the senior judge for reassignment and a hearing de novo.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **June 16, 2004**

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge